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No. 86-1049

In The
Supreme Court of the United States
October Term, 1986

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP E. KAPLAN*
JOANN C. MAXEY
KAPLAN, BREWER & MILLER, P.A.
415 Main Street
Little Rock, Arkansas 72201
(501) 372-0400

Counsel for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether the improper firing of a court clerk by a municipal judge given the discretion to hire and fire his employees establishes an unconstitutional municipal employment policy for which a municipality may be held liable under 42 U.S.C. § 1983?

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Respondent Debbie Williams respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The district court did not issue a formal written opinion in this matter. A copy of the judgment is included in the Appendix, page A-1 of the petition. The panel decision of the United States Court of Appeals is also included in the Appendix, page A-9 of the petition. *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984). The court divided evenly on rehearing *en banc,* so no additional opinion was rendered. A copy of the May 13, 1985, order affirming the district court is included in the Appendix, page A-37 of the petition. *Williams v. Butler,* 762 F.2d 73 (8th Cir. 1985). This judgment was then vacated by this Court. *City of Little Rock v. Williams,* — U.S. —, 106 S.Ct. 1508 (1986). The opinion of the court of appeals which was rendered on remand is included in the Appendix, page A-38 of the petition. *Williams v. Butler,* 802 F.2d 296 (8th Cir. 1986).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REASONS FOR DENYING WRIT

The arguments advanced by petitioner are based on factual disputes, which do not warrant review, rather than legal disputes.

STATEMENT OF THE CASE

The respondent, Debbie Williams, agrees for the most part with the statement of facts set forth in the City of Little Rock's petition. Respondent, however, does disagree with a few very critical facts.

The City asserts that it defended this base by contending that "Butler's decision to fire Williams was a matter of discretion that did not constitute any policy, custom or practice of the City," and that "any authority Butler may have had as a result of this discretion was exceeded by this aberrant act." (Pet. 3) The City did not base its defense on these positions. It defended this action by contending that Butler, Williams, Stanley and all the other employees in municipal court were not city employees. It further asserted that under Arkansas law, Butler was the only person who could control employment matters in his court, and that the City could not interfere with those powers.

The crux of the City's argument on appeal was that the City should not be liable for a single incident of illegality of one of its officials. The City did not seriously challenge the district court's finding that Butler possessed final authority. The City maintained this position until this matter was remanded to the Eighth Circuit for consideration in light of *Pembaur v. City of Cincinnati*, — U.S. —, 106 S.Ct. 1292 (1986). *City of Little Rock v. Williams*, — U.S. —, 106 S.Ct. 1508 (1986). At this point, the City asserted for the first time that Butler merely had discretion in hiring and firing municipal court employees.

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STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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ARGUMENT

The respondent, Debbie Williams, was fired from her job as clerk of the municipal court in 1981. In 1983 she was awarded $40,000.00 for damages resulting from her unconstitutional dismissal. Since that time, this case has been reviewed by the Eighth Circuit Court of Appeals on three separate occasions and by this Court on one other occasion. This will now be the fifth review by an appellate court on the issue of municipal liability. If this Court declines to resolve finally this case as long as there is a case pending in which an issue under *Monell vs. Dept. of Social Services,* 436 U.S. 658 (1978) is raised, it is possible that this case could remain at the appellate level indefinitely. This case, which does not involve a large sum of money, does not warrant such an exhaustive review. It is time for this case to be laid to rest.

The City's petition describes a case which, were it ever to arise, would present a difficult issue under *Monell.* The case summarized in the petition involves three distinct circumstances militating against municipal liabilty. (1) The City Manager exercises final policy making authority over

city employment and a City Judge exercises only limited and carefully circumscribed discretion. (Pet. 7 n.1) (2) The City Judge fires a clerk for a reason "[c]learly . . . contrary to local policy" (Pet. 10, 11), and with "no authority" to do so. (Pet. 11) (3) The City Manager has the power to correct that unauthorized act, but the dismissed employee inexcusably fails "to seek help from the City Manager." (Pet. 7 n.1) If the circumstances of this case actually met that description, we would be hard pressed to defend the decision of the court of appeals.

But the actual facts of the case, indeed the facts as asserted by petitioner itself at trial, simply bear no relationship to the hypothetical case now conjured up in the petition. When this case was in the district court, the City attempted to avoid liability by asserting that respondent was not a city employee at all, and grounded that argument on a contention that Little Rock city officials, including the City Manager, had absolutely no control over the hiring and firing of judicial clerks. As the Eighth Circuit noted, "The city's position throughout the trial was that [Judge] Butler, not the city, had exclusive control and ultimate responsibility with respect to employment matters in the municipal court." (Pet. App. 47 n.4). Far from asserting that the City Manager could have reinstated respondent had she appealed Judge Butler's action, the City insisted "defendant Butler *only*" had such authority.[1] Coun-

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[1]Record at 71-72, City's Brief in Support of Third Party's Motion to Dismiss:

> By Act 694 of 1981 . . . the Legislature mandated a chief clerk . . . for the . . . Little Rock Municipal Court, and that act empowers the Judge . . . to *employ* those personnel . . . [D]efendant Butler *only* has authority to em-

(Continued on following page)

sel for petitioner urged at trial that neither the City Manager nor the City Board had established any limitations on or retained any control over the dismissal of a clerk such as respondent; "[T]he legislative and executive branches of the City are not to interfer[e] with those powers in the municipal court."[2] At no time prior to the filing of the latest petition did counsel for the City even assert that the City Charter, Art. IV § 2, applied to the actions of Judge Butler or forbade the dismissal of respondent.

The factual assertions contained in the petition are inconsistent, not only with petitioner's past position, but also with the concurrent factual findings of both courts below. The district court concluded that Butler, as the chief administrative officer of the municipal court,

> had the sole and exclusive control of the hiring, termination, discipline, [and] discharge of his employees. (Tr. 493-94)

In response to the City's question whether Butler had been given policy making authority with regard to judicial employees, the district court commented,

> I'm finding that they completely turned it over to him, and he operated it exclusively . . . I think he not only set the policy, he did it all.
> (Tr. 494-95)

(Continued from previous page)

> ploy the personnel . . . If the Court orders reinstatement of the plaintiffs, it is obvious that defendant Butler must terminate those persons who he appointed to succeed the plaintiffs . . . (emphasis in original)

See also, Pet App. 48 ("[P]aragraph 9 of the city's answer . . . denies that it had the power to reinstate the plaintiffs, and denies that Butler did not possess such power").

[2]Record, p. 252.

The trial court concluded that Butler had "acted in his 'official capacity' and within the authority delegated to him by the City" when he discharged respondent. (Pet. App. 3).

The appellate panel which first heard this case squarely upheld the trial court's finding that Butler had acted within his authority when he violated respondent's constitutional rights.

> [T]he City, by custom and practice for at least fifteen years, had established a policy of giving municipal judges *carte blanche* authority to make their own personnel decisions. It is equally clear that Butler acted pursuant to this policy when he fired Williams. (Pet. App. 14)

The panel emphasized, as had the district judge, that there was no procedure which an aggrieved employee could invoke to seek review of a personnel decision by Judge Butler.[3] The *en banc* panel arrived at the same conclusion, holding that the City had delegated to Butler

> policymaking authority concerning employment matters in the municipal court, and that he acted pursuant to that authority when he chose to discharge Williams for exercising her first amendment rights. (Pet. App. 45)[4]

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[3]Pet. App. 18 ("there is no internal procedure of redress for the victim of an unconstitutional act").

[4]*See also* Pet. App. 46 ("The record amply supports the district court's finding that Butler possessed policy-making authority and was acting pursuant to that authority when he, as the jury found, discharged Williams").

The district court's finding to that effect was upheld as "not clearly erroneous" (Pet. App. 46). The city's argument that it had never delegated such authority to Butler, the *en banc* court held, was "[c]ontrary to its position at trial and contrary to the evidence in the record." (Pet. App. 48). The court of appeals emphasized that there was no evidence "that grievance procedures existed whereby municipal court personnel could appeal adverse employment decisions." (Pet. App. 51 n.6)

Petitioner suggests that the Eighth Circuit has held that any exercise of discretion constitutes the making of official policy. In fact, however, the Eighth Circuit expressly held to the contrary. The original panel ruled that "a city may not be liable for the discretionary decisions of its officials" (Pet. App. 20), and emphasized the "crucial" "distinction between" "a discretionary decision" and an "act [that] itself is policy." (Pet. App. 21-22 n.10). The *en banc* court recognized that a similar distinction had been made by footnote 12 in *Pembaur*, and upheld the finding of liability because the City's argument that Butler enjoyed only limited discretion, not policy-making authority, was "contrary to the city's position at trial and also contrary to the evidence." (Pet. App. 48).

The petition suggests that the dismissal of respondent violated the provision of the city charter prohibiting the dismissal of an employee "except for just cause"; and that the Eighth Circuit has thus ruled that a city can be held liable "for the acts of a decision maker that are clearly contrary to officially promulgated local policy: (Pet. 10-11). The decisions below are based, however, not on any

such legal doctrine, but on a rejection of petitioner's post-*Pembaur* factual assertion that the City limited Butler's authority to dismiss respondent. (Pet. App. 49). Indeed, petitioner itself insisted at trial that there were no city personnel rules limiting the reasons for which Butler could dismiss an employee[5].

Nine years of experience under *Monell* have demonstrated that the manner in which policymaking authority is distributed among the officials of a particular locality varies enormously from city to city. These factual differences necessarily and properly are of controlling importance in the disposition of specific cases. Thus in 1984, only three months before the panel decision in the instant case, the Eighth Circuit rejected municipal liability in another appeal because the evidence there revealed that the city employee guilty of wrongdoing had merely abused his discretion, and had not exercised any policymaking authority. *Dick v. Watonwan*, 738 F.2d 939 (8th Cir. 1984). The varying resolution of such fact-bound controversies does not mean, as petitioner suggests, that particular panels or circuits are applying different, albeit unstated, legal standards.

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[5]Record at 73-74, City's Brief in Support of Third Party's Motion to Dismiss:

> The third party defendant's complaint of defendant Butler is totally void of any allegation of personal involvement of the governing body of the city in the firing of the plaintiffs. Defendant Butler's attempt to imply something . . . could hardly be true in view of defendant Butler's authority to hire and fire persons . . . and the lack of authority of the city's governing body over those positions . . .

See also Record at 71-72, *supra* n.1; Record at 252, *supra* n.2.

Petitioner does not, of course, suggest that certiorari would be warranted if the facts were as found by the district court and court of appeals. Petitioner argues, rather, that the "real" facts are that Butler had neither policy-making nor final authority, and that Butler violated city standards when he dismissed respondent and that city officials had the authority to overturn respondent's dismissal had she chosen to appeal. Proceeding on that somewhat fanciful premise, petitioner speculates as to the legal rules that might have been utilized to impose liability on its version of the facts, and asks the Court to grant certiorari to pass on the correctness of those hypothesized legal standards. The Court does not ordinarily exercise its discretionary jurisdiction on that basis.

We recognize that this Court has to some extent been divided as to the appropriate interpretation of *Monell.* Those differences cannot readily be resolved, however, in a case such as this in which the central argument advanced by the petition is an attack on the concurrent factual findings of the two courts below, and a repudiation of the factual and legal contentions which petitioner itself advanced at trial.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PHILIP E. KAPLAN*
JOANN C. MAXEY
KAPLAN, BREWER & MILLER, P.A.
415 Main Street
Little Rock, Arkansas 72201
(501) 372-0400

Counsel for Respondent

*Counsel of Record